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Supreme Court, U.S.
FILED
OCT 24 2006
OFFICE OF THE CLERK

No. 05-1120

IN THE

Supreme Court of the United States

THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS ALLIANCE OF AUTOMOBILE MANUFACTURERS, ENGINE MANUFACTURERS ASSOCIATION, NATIONAL AUTOMOBILE DEALERS ASSOCIATION, TRUCK MANUFACTURERS ASSOCIATION

KENNETH W. STARR
STUART A.C. DRAKE
ANDREW B. CLUBOK
ASHLEY C. PARRISH
DEREK S. BENTSEN

KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W
Washington, D.C. 20005
(202) 879-5000

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, Ohio 48123

THEODORE B. OLSON
Counsel of Record
MIGUEL A. ESTRADA
DAVID DEBOLD
MATTHEW D. MCGILL
AMIR TAYRANI

GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether petitioners have standing to challenge EPA's decision not to regulate the emission of carbon dioxide and other compounds that may contribute to global climate change.

2. Whether the EPA Administrator has authority under section 202(a)(1) of the Clean Air Act to regulate carbon dioxide and other compounds that may contribute to global climate change.

3. Whether the EPA Administrator may decline to issue emissions standards for motor vehicles based on policy considerations not specifically enumerated in section 202(a)(1) of the Clean Air Act.

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INTRODUCTION AND COUNTERSTATEMENT

In their zeal to compel the Environmental Protection Agency (EPA) to regulate "greenhouse gases" for purposes of affecting the overall composition of the Earth's atmosphere, petitioners urge this Court to upend three settled legal doctrines. Petitioners first seek to expand the scope of Article III standing to encompass suits by litigants whose alleged injury is speculative and generalized—not imminent or particularized—and not redressable through judicial action. Petitioners also disregard the Clean Air Act's plain language, seeking through judicial fiat to vest EPA with regulatory authority that Congress has never seen fit to afford it and has instead expressly granted to other federal agencies. Finally, petitioners cast aside the requisite judicial deference to agency decision-making by seeking to persuade this Court to substitute petitioners' judgment for that of the agency's Administrator who concluded that, even if Congress had given EPA authority to regulate greenhouse gas emissions for purposes of affecting the global climate, such regulation would be inappropriate at this time. The rejection of any of these three untenable positions is a sufficient basis, standing alone, to affirm the court of appeals' decision.

1. The core provisions of the Clean Air Act, Pub. L. No. 88-206, 77 Stat. 393 (1963), 42 U.S.C. § 7401 *et seq.*, have been on the books for decades. The Act has been heavily revised over the years, with notable amendments enacted on several occasions after close congressional scrutiny. The essence of the Act is to establish a federal framework for working with state and local governments to prevent and control "air pollution" through federal mandates designed to achieve reductions in "air pollutants," a defined term under the Act. 42 U.S.C. § 7401(a) & (b).

As its title indicates, the "Clean Air" Act was devised as an inter-governmental regulatory framework to accomplish the "cleaning" of the air we breathe—to reduce or eliminate substances identified as causing "dirty" air. Congress's use

in the Act of the term "air pollutant" in this ordinary sense is reinforced by the various substances expressly identified in the Act as air pollutants, such as carbon monoxide, hydrocarbons, nitrogen oxides, and particulate matter. *See* 42 U.S.C. § 7602. These are all "air pollutants" that, at excessive levels, cause direct substantial health problems for humans.

For nearly four decades, EPA has carried out the task of preventing and controlling air pollution through regulatory actions that help clean the air, making it fit to breathe. EPA is required to set national ambient air quality standards (NAAQS) for any "air pollutant" that causes or contributes to "air pollution" reasonably anticipated to endanger public health or welfare. *See id.* §§ 7408-7409. The federal and state partnership for satisfying the NAAQS in local air quality control regions is accomplished through state implementation plans. *See id.* § 7410.

Title I of the Clean Air Act focuses on preventing and controlling "air pollution" emitted by stationary sources (such as factories and power plants). Title II of the Act, at issue here, creates a regulatory framework for controlling "air pollution" from motor vehicles and other mobile sources. *See id.* §§ 7521-7590. Mirroring the provisions of Title I, Title II authorizes EPA's Administrator to prescribe standards "applicable to the emission of any air pollutant from any class or classes of new motor vehicles ... which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *See id.* § 7521(a)(1).

2. No EPA Administrator has ever understood the agency to have authority to regulate emissions of carbon dioxide (CO_2) for purposes of affecting global climate change, nor has any determined carbon dioxide to be an "air pollutant." Carbon dioxide is a significant, naturally occurring gas compound in the Earth's atmosphere; it is exhaled by every living, breathing human and animal; and it is essential to life, serving as an irreplaceable component of plant photosynthe-

sis. For decades, Congress and EPA have encouraged processes by which harmful pollutants, such as carbon monoxide, are reduced or eliminated by transforming them into harmless byproducts, including water vapor and carbon dioxide. The standard process by which catalytic converters operate to reduce air pollution from motor vehicles, for example, results in the production of carbon dioxide and its emission into the air.

From time to time, Congress has considered issues affecting the atmospheric environment, such as concerns about ozone depletion in the stratosphere, which are global rather than local or regional in scope and hence cannot readily be addressed within the intergovernmental domestic framework established by the Act. On this issue of upper-atmospheric ozone, in particular, Congress eventually decided to take action by making an express delegation of authority to EPA under a new regulatory framework. *See* 42 U.S.C. §§ 7671-7671q.

Another broad issue that has been discussed and analyzed is the proposed regulation of greenhouse gases—such as carbon dioxide, water vapor, methane, and nitrous oxide—emitted from new motor vehicles and engines. As with stratospheric ozone depletion, this issue is global in scope. And because greenhouse gases tend to dissipate uniformly throughout the atmosphere, it does not easily or practically lend itself to localized regulation through the federal-state partnership established under the Clean Air Act. Nor does this issue involve the "cleaning" of "dirty" air; rather, it involves a more complex effort to regulate the overall composition of the Earth's atmosphere in order to affect global climate change—a controversial phenomenon that is far from fully understood or defined, and which remains the subject of intense debate within the scientific community. *See* JA 152.

3. This case stems from a rulemaking petition initiated in 1999 by a group of parties, including a variety of academic centers and research groups. *See* JA 5-45. The petition re-

quested that EPA undertake the regulation of greenhouse gases, including carbon dioxide, emitted by new motor vehicles. The petition alleged that such gases contribute to global climate change and should be regulated under Title II of the Clean Air Act. EPA went through a multi-year process of soliciting and analyzing comments on the petition and ultimately denied it. EPA determined that it lacked statutory authority to regulate carbon dioxide and other greenhouse gases for purposes of addressing global climate change. *See* Pet. App. A-59-A-93. EPA noted, in particular, that the only references in that Act to carbon dioxide or global climate change were non-regulatory in nature, and concluded that carbon dioxide and other greenhouse gases do not fit the statutory definition of "air pollutant[s]." *See id.* In addition, EPA noted that Congress was continuing to address the issues relating to global climate change in other legislation and had rebuffed numerous attempts to grant this new authority to EPA, including in the Senate's consideration of the United Nations Framework Convention on Climate Change. *See id.* In none of these congressional debates has it ever been determined that no further legislative action is necessary on the ground that such regulatory authority was conferred on EPA nearly four decades ago when Congress first passed the Clean Air Act.

EPA emphasized that any attempt it might make to regulate motor vehicle greenhouse gas emissions would upset and interfere with the Department of Transportation's carefully calibrated, mandatory fuel-economy standards, which are "the only practical way to reduce tailpipe emissions" of carbon dioxide. *Id.* at A-79. EPA further explained that, even if it had been granted statutory authority by Congress, it would exercise its discretion to deny the rulemaking petition because the Administrator did not believe "it would be either effective or appropriate for EPA to establish [greenhouse gas] standards for motor vehicles at this time." *Id.* at A-82. Relying on a comprehensive report by the National Research

Council, EPA observed that there remains significant scientific uncertainty regarding "the factors that may affect future climate change and how it should be addressed." *Id.* at A-83. In light of this uncertainty and the ongoing congressionally funded studies designed to augment scientific understanding of global climate change, EPA concluded that it would be premature to regulate greenhouse gases. *See id.* at A-85. EPA also determined that the regulation of greenhouse gas emissions from motor vehicles would be inappropriate because such regulation would have the immediate potential to interfere with the United States' efforts to persuade developing nations on the subject; would result in inefficient, piecemeal regulation; and would exceed the capabilities of present technology. *See id.* at A-86-A-87.

4. Petitioners, joined by various state attorneys general, appealed EPA's decision to the Court of Appeals for the District of Columbia Circuit, which affirmed in a decision that resulted in three separate opinions. What stands as the basis for the judgment of the court is the opinion by Judge Randolph, who indicated that he was willing to presume that petitioners met the requirements for standing, which he found to be intertwined with the merits, *see id.* at A-8-A-10, and went on to determine that EPA had properly exercised its discretion to deny the petition. He stated that he would "assume *arguendo* that EPA has statutory authority to regulate greenhouse gases from new motor vehicles," but upheld EPA's denial of the petition because the Administrator has "considerable discretion" to make policy judgments in dealing with such a petition, which in this case would have required EPA to "resolve issues 'on the frontiers of scientific knowledge.'" *Id.* at A-10, A-13-A-15.

Judge Sentelle found that petitioners lacked standing. He did not address the merits, but joined Judge Randolph in announcing the judgment of the court. *See id.* at A-20. In his opinion, Judge Sentelle found that petitioners had "shown no harm particularized to themselves," but only "the sort of gen-

eral harm eschewed as insufficient to make out an Article III controversy." *Id.* at A-17-A-18.

Judge Tatel, by contrast, found for petitioners on standing and against EPA on the merits. On standing, he was convinced by declarations in the record submitted by Massachusetts suggesting that global warming might cause sea levels to rise and could eventually lead to the erosion of a portion of the Commonwealth's land mass. *See id.* at A-27. On the subsidiary standing issues of causation and redressability, he was willing to accept as adequate a chain of connection, sketched out in various declarations, between EPA's potential actions domestically, potential responsive actions by millions of individuals and consumers, potential eventual effects of these actions on the global climate, and other actions to be possibly undertaken in the future by other nations. *See id.* at A-27-A-30. On the merits, Judge Tatel concluded that EPA had the statutory authority to regulate greenhouse gas emissions, and that EPA had abused its discretion by failing to grant the petition. *See id.* at A-31-A-56.

The panel denied rehearing, Judge Tatel dissenting; rehearing en banc also was denied, with Judges Rogers, Tatel, and Griffith dissenting. *See id.* at A-94-A-98.

SUMMARY OF ARGUMENT

1. Petitioners do not meet the irreducible constitutional minimum requirements for standing to sue. If petitioners are to avoid injuries from changes in the global climate, which they believe may occur by the year 2100, a long, tenuous chain of events beyond the control of either the parties or this Court must occur over a period of several decades. Even assuming a significant reduction in greenhouse gases emitted from new motor vehicles sold in the United States could be achieved through regulation, it is purely speculative whether such regulation would spur a large enough reduction in *worldwide* greenhouse gases to affect the composition of the Earth's atmosphere and avoid the injuries predicted by peti-

tioners. The chain of causation allegedly linking EPA's actions to petitioners' alleged injuries—as affected by hypothetical and unproven assumptions about actions by foreign governments and other third parties, poorly understood changes in the atmosphere, and their ultimate effects—is highly attenuated and uncertain, and thus insufficient to satisfy Article III's rigorous requirements.

2. Even if petitioners could establish standing, the petition should be denied because EPA has no authority to regulate greenhouse gas emissions for purposes of affecting the global climate. The text of the Clean Air Act makes plain that Congress intended it as a measure to "clean" the air of pollutants, not to alter the overall composition of the Earth's atmosphere. Accordingly, Congress has never contemplated EPA regulation of carbon dioxide emissions from automobiles. Quite the opposite is apparent from both the text and the structure of the Act. Not only has Congress never regarded carbon dioxide as an "air pollutant" subject to regulation under the Act, but its only explicit mention of carbon dioxide is in a single passage that makes clear Congress's intention to deny EPA any authority to regulate emissions of carbon dioxide. Petitioners' claim is utterly inconsistent with the agency's approach to reducing other air pollutants, in place for nearly four decades, by transforming those impurities into what are regarded as "harmless by-products," including water vapor and carbon dioxide. Far from being treated as an "air pollutant," carbon dioxide has been uniformly regarded as a non-pollutant whose production has been encouraged in order to reduce or eliminate those pollutants specified in the statute and regulations. It is up to Congress to take the step that petitioners are here demanding from the courts. The Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), strongly reinforces the grounds for that conclusion.

3. Finally, even if Congress had granted EPA expansive authority to regulate for purposes of affecting the global cli-

mate, EPA properly exercised its broad regulatory discretion when it concluded that regulation of greenhouse gas emissions from new motor vehicles is inappropriate at this time. Agency decisions refusing to initiate rulemaking proceedings are singularly ill-suited to judicial review because they involve discretionary determinations about the allocation of scarce agency resources and the ordering of agency regulatory priorities. This Court lacks the administrative expertise to second-guess EPA's determination that scientific uncertainty, regulatory inefficiency, technological infeasibility, and foreign policy considerations militate against the regulation of greenhouse gas emissions. EPA's inherent regulatory discretion is reinforced by the broad grant of discretionary authority explicitly afforded by section 202(a) of the Clean Air Act. In exercising his "judgment" about whether and when to make an endangerment finding regarding an "air pollutant," the Administrator is at liberty to consider policy considerations he deems appropriate.

ARGUMENT

I. Petitioners Lack Article III Standing.

Petitioners make only the most casual of efforts to demonstrate standing, even though standing was contested below; only dissenting Judge Tatel found that petitioners had established it; and petitioners have the burden of satisfying this threshold requirement. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *see also* Pet. Br. 4-7. These foundational problems cannot be assumed away. Petitioners' alleged injuries are based on scientific hypotheses that "remain incompletely resolved" and will come to pass, if ever, perhaps by the year 2100. Pet. Br. 2. Moreover, because reducing greenhouse gas emissions from new motor vehicles in this country will not likely have any direct measurable effect on the global climate, any potential injury petitioners may eventually suffer is unlikely to be remedied by a remand to EPA. Even when supported by reams of untested

declarations, such generalized, speculative allegations are insufficient to establish Article III standing.

To invoke the Court's jurisdiction, petitioners must satisfy the three elements of the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Those requirements are clear. A plaintiff (or petitioner) must plead and prove an "injury in fact" that is: (1) "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) fairly traceable to the defendant's conduct, not "the result [of] the independent action of some third party not before the court"; and (3) "likely" to be "redressed by a favorable decision." *Id.* at 560-61 (internal quotation marks omitted; brackets in original). These requirements become "'substantially more difficult' to establish" where, as here, the parties invoking federal jurisdiction are not themselves "the object of the government action or inaction" they are challenging. *Id.* at 562. Petitioners have failed to satisfy these basic requirements.

A. Petitioners' Alleged Injuries Are Conjectural, Not Imminent, And Too Generalized.

"Allegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Although a plaintiff need not "await the consummation of threatened injury" before invoking a federal court's jurisdiction, the threatened injury must at least be "certainly impending." *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1982) ("the ... threat of injury must be both 'real and immediate,' not 'conjectural or hypothetical'"). Petitioners' alleged injuries are neither certain nor impending.

Petitioners' central allegation is that EPA's failure to regulate greenhouse gas emissions from new motor vehicles, such as cars and light trucks, may cause substantial harm by

the year 2100. Petitioners argue that unless EPA takes action, atmospheric concentrations of greenhouse gases "are likely to increase," and, as a result, the Earth's average surface temperature "is projected to increase," perhaps "2 to 4.5°C over 1990 levels," "[b]y the end of the century." JA 230-31. This projected increase in global temperatures, in turn, leads to the further projection that "by 2100" sea levels will rise by "about 4 to 35 inches," and that "the length of the very warm season will increase," along with "the frequency and intensity of intense convective rainfall events." JA 233-35.

It is this apocalyptic vision of conditions in the year 2100 upon which petitioners base their allegations of injury. For instance, the City of Baltimore alleges that global climate change will result in rising sea levels that may eventually damage property within the City's floodplain. *See* Conrad Decl. ¶ 10. That fear is based on "scientific models" predicting "that in the Chesapeake Bay the associated sea level rise would be approximately 27 inches *by the year 2100*." *Id.* ¶ 8 (emphasis added). Massachusetts' fears of eventual coastal inundation are similarly bottomed on climate and sea level forecasts for the year 2100. *See* Hoogeboom Decl. ¶ 6; Kirshen Decl. ¶ 6; Jacqz Decl. ¶ 11; *see also* JA 231 (MacCracken Decl.) (stating that the rate of warming will accelerate over time, putting the most significant temperature increases at the end of the century).

Alleged injuries that might occur (if ever) ninety-four years in the future are insufficient to establish standing. This Court's discussion in *Whitmore* of its decision in *United States v. SCRAP*, 412 U.S. 669 (1973), confirms the point. *See* 495 U.S. at 158-59. In *Whitmore*, this Court contrasted the petitioner's claim of injury—that the challenged state court decision could affect his sentencing in the event of a retrial—with the injury alleged in *SCRAP*, which was similarly premised on improbable contingencies and "surely went to the very outer limit of the law." *Id.* at 159. This Court dis-

tinguished *SCRAP* on the ground that the *SCRAP* litigants had alleged harms that "would befall its members imminently if the ICC orders were not reversed," while Whitmore could not make "a similar claim of immediate harm." *Id.* The Court concluded that the failure to demonstrate "that the string of occurrences alleged would happen immediately" precluded a finding that Whitmore's allegation of injury was sufficiently "real and immediate" to confer standing. *Id.* So too here. "Although 'imminence' is concededly a somewhat elastic concept," it is "stretched beyond the breaking point," when a plaintiff alleges only an injury "at some indefinite future time." *Lujan*, 504 U.S. at 565 n.2.

The lack of imminence is compounded by the highly generalized nature of the alleged injury. As Judge Sentelle correctly noted, the "phenomenon known as 'global warming' ... is harmful to humanity at large." Pet. App. A-18. Petitioners therefore "have alleged and shown no harm particularized to themselves." Pet. App. A-17. The requirement of a particularized injury—an injury that affects the plaintiff in a "personal and individual way," *Lujan*, 504 U.S. at 560 n.1—is essential to ensuring the proper allocation of power between our three branches of government. "Without such limitations," whether grounded in Article III or prudential considerations, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Congress has at times given courts the power to vindicate interests that—absent such explicit authorization—would be too generalized. *See, e.g., FEC v. Akins*, 524 U.S. 11, 22 (1998) (injury-in-fact requirement satisfied where a statute seeks to protect respondents "from the kind of harm they say they have suffered, *i.e.*, failing to receive particular information about campaign-related activities"). But there is no indication Congress in-

tended to cede to the judicial branch—at the instigation of any person, organization, or government the world over—the power to address the political issue of global climate change. As this Court has recognized, such generalized grievances are "more appropriately addressed in the representative branches." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (citation and internal quotation marks omitted).

The need to establish the imminence of an injury—even a particularized one—is especially important where the possibility of its occurrence is heavily contingent upon the conduct of third parties. As even the dissenting opinion in *Lujan* recognized, in cases where the "harm turn[s] largely on the affirmative actions of third parties beyond a plaintiff's control," this Court has strictly applied the "imminence" requirement. *See* 504 U.S. at 592-93 (Blackmun, J., dissenting). This case amply illustrates the wisdom of such a constraint on the exercise of judicial power.

Each of petitioners' specific allegations of injury—inundation of coastal property, damage to coastal facilities, and increased costs for health care and emergency response—is grounded in an assumption that, absent EPA regulation of a small fraction of global emissions (that is, those from new vehicles in the United States), "atmospheric concentrations of [greenhouse] gases are likely to increase at least as much and at least as fast as in recent decades." JA 230-31 & n.13. This is speculative in the extreme. Worldwide events occurring in the last two years demonstrate how risky it is for courts to recognize standing based on injuries that may occur, if at all, in the very distant future. For example, the Kyoto Protocol, which came into effect on February 16, 2005, requires ratifying "Annex 1" nations (a group that includes every nation of the European Union, Russia, and Canada) to reduce their greenhouse gas emissions by 2012 to approximately five percent *below* 1990 levels. *See* Kyoto Protocol to the United Nations Framework Convention on

Climate Change, art. 3 ¶ 1. Great Britain has separately committed to reduce its greenhouse gas emissions to 60 percent of its 1990 levels by 2050. *See* Alex Kirby, *UK 'will make bigger greenhouse cuts'*, BBCNews, May 8, 2003, http://news.bbc.co.uk/2/hi/science/nature/3011169.stm. In the United States, many companies have undertaken to reduce emissions on a voluntary basis. *See, e.g.*, EPA, GHG Reduction Goal Achievers, http://www.epa.gov/climateleaders/partners/goalachievers.html (last visited Oct. 22, 2006) (identifying industries in the United States that are voluntarily reducing greenhouse gas emissions). As for the future, it simply is not possible to predict, with any degree of certainty, the changes—whether positive or negative—that will result from other international, national, or private-sector actions. This is especially problematic where such predictions must cover conduct that might occur decades from now and where the actions of other actors could easily render inconsequential the effects of a decision whether to regulate the small portion of worldwide emissions at issue here.

In short, because they do not face any imminent injury, petitioners are forced to rely on predictions of harm decades in the future, the occurrence of which is largely (if not entirely) dependent on actions other nations take in their own regulation of greenhouse gas emissions. Petitioners' hypotheses, each of which is the subject of an active scientific debate, *see* Amicus Curiae Brief of Climatologists and Scientists Sallie Baliunas, *et al.* at 5 & 8-9; *see also infra*, pp. 44-45, are reduced to conjecture by the inherent uncertainty of global events that will unfold between now and the time of the predicted injury. The ultimate terminus of petitioners' speculative chain accordingly cannot be viewed as "certain" to occur. By prohibiting adjudication of petitioners' speculative claims of injury, the injury in fact requirement "reduce[s] the possibility of deciding a case in which no injury would have occurred at all." *Id.*

Perhaps recognizing that their purported injuries are neither imminent nor concrete, petitioners also now contend that EPA's conclusion that carbon dioxide is not a "agent of air pollution" threatens to preempt the efforts of California and other States to regulate vehicular greenhouse gas emissions. *See* Pet. Br. 6 n.5; *see also* Br. of State of Ariz., *et al.*, as Amici Curiae in Supp. of Pet'rs. State regulation of carbon dioxide from motor vehicles is a subject of pending litigation in several federal courts and in state court.[1] This Court has held that claims of injury predicated on the outcome of collateral litigation are too conjectural to satisfy Article III. "It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case." *Whitmore*, 495 U.S. at 159-60. This is particularly so in this instance. The principal challenge to the state regulations in the cases in the district courts is that they are preempted by the Energy Policy and Conservation Act, 49 U.S.C. § 32901, *et seq.* (EPCA), which gives the National Highway Traffic Safety Administration authority to set mandatory fuel economy standards.[2] Regardless of the status of the state regula-

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[1] *See, e.g., Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. 04-6663 (E.D. Cal.); *Green Mountain Chrysler Plymouth Dodge Jeep v. Balmasse*, No. 05-cv302 (D. Vt.); *Lincoln Dodge, Inc. v. Sullivan*, No. 06-70 (D. R.I.); *Fresno Dodge, Inc. v. California Air Resources Board*, No. 04-CECG-03498 (Fresno County Superior Court); *General Motors Corp. v. California Air Resources Board*, No. 05-CECG-02787 (Fresno County Superior Court).

[2] In the case pending in the Eastern District of California, several petitioners moved to dismiss the challenges to the state greenhouse gas regulations under EPCA, on the ground that any state regulation that is lawful under the Clean Air Act could not be preempted under EPCA. The District Court rejected that argument and determined that the implied conflict preemption claims under EPCA presented by the specific regulations involved in that case should go to trial. *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. 04-6663 (E.D. Cal., Sept. 25, 2006) (Doc. # 363), slip op. at 16 ("Nothing in the statutory language or the legislative

tions under the Clean Air Act, the state greenhouse gas regulations involved in the pending actions in the district courts would still be invalid under federal law if those regulations conflict with the goals and purposes of the federal fuel economy program—which is an issue that can only be decided on the merits in the pending actions, where the interplay between the specific state regulations and the federal fuel economy program can be determined on a full record.

In any event, it is axiomatic that "standing is to be determined as of the commencement of suit." *Lujan*, 504 U.S. at 570-71 n.5; *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."). Petitioners filed their petition for review in the D.C. Circuit on October 23, 2003. *See* JA 1. California did not promulgate regulations restricting vehicular carbon dioxide emissions until September 2004, *see* California Air Resources Board, Resolution 04-28 (Sept. 23, 2004), and litigation concerning the validity of those regulations did not ensue until December 2004. Petitioners could not possibly have faced imminent injury in 2003 due to litigation that was not initiated until December 2004. *See* Compl., *Cent. Valley Chrysler-Jeep, Inc.* (Dec. 7, 2004).[3]

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history of the Clean Air Act ... or any other statute before the court indicates Congress's intent that [approval under the Clean Air Act] would allow a California regulation to disrupt" the federal fuel economy program.).

[3] None of the cases cited in the amicus brief from the State of Arizona stands for the remarkable proposition that a State has standing to challenge an agency decision simply because the reasoning of the decision gives a third party a colorable basis for challenging a State's regulatory efforts in a separate proceeding. And other cases explicitly reject such a notion. *See, e.g., Sea Land Service, Inc. v. Dep't of Transportation*, 137 F.3d 640, 648 (D.C. Cir. 1998) ("mere precedential effect within

Neither category of injury alleged by petitioners is actual or imminent; each is overly speculative; and the one that originally formed the basis for petitioners' challenge is as generalized as could be imagined. Petitioners have not satisfied the injury-in-fact requirement.

B. The Relief Requested By Petitioners Is Unlikely To Redress Their Alleged Injuries.

Petitioners contend that, "[a]bsent changes in policy to reduce greenhouse gas emissions, atmospheric concentrations of these gases are likely to increase" and they will suffer grave injuries as a result. JA 230-31. But petitioners' lawsuit, even if it were successful, is unlikely to result in any significant reduction in atmospheric concentrations of greenhouse gases or to prevent the injuries of which petitioners complain. It is, at most, a matter of "unadorned speculation" whether petitioner's lawsuit will result even in regulations restricting vehicular emissions of such gases in the United States. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976). It is a matter of even greater speculation whether such regulations, if promulgated, would noticeably affect any of the climate-related conditions that petitioners assert as their basis for injury-in-fact. Petitioners, therefore, do not stand to "'benefit in a tangible way from the court's intervention.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998) (quoting *Warth*, 422 U.S. at 508).

Petitioners' claim of redressability relies on a chain of inferences too speculative to satisfy Article III's minimum requirements. Petitioners concede that a favorable judgment in this Court will do nothing more than send the matter back to EPA for a determination whether greenhouse gas emissions from new vehicles endanger public health or welfare. Pet.

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an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation").

Br. 3 (asking this Court "to remand the case to the agency with directions to apply the correct legal standard to this matter; that is all.") Assuming that scientific evidence is sufficiently developed to allow EPA to make such a determination, petitioners precariously rest their standing claim on a chain of unsupported suppositions: that EPA will conclude it is technologically feasible to implement regulations limiting vehicular greenhouse gas emissions, *see* 42 U.S.C. § 7521(a)(2); that such regulations will spur the development of technology that otherwise would not have become available; that such technological advances will lead other countries to reduce greenhouse gas emissions to the point where the overall effect on global atmospheric greenhouse gas concentrations is great enough to prevent a material rise in sea levels or other climate-related events; and that greenhouse gas emissions from other sources around the world will not offset these salutary effects.

Petitioners offer little reason for the Court to join them in this speculative leap of faith. Even if it were certain that, on remand, EPA would promulgate restrictions on greenhouse gas emissions, it is uncertain whether such restrictions would result in any appreciable reduction in atmospheric concentrations of greenhouse gases. Such regulations would apply only to new motor vehicles sold in the United States. The new vehicles would comprise a mere fraction of the "U.S. transportation sector" to which petitioners ascribe seven percent of global fossil fuel emissions. JA 238. More importantly, unlike true "air pollutants"—whose concentrations and potential impacts are local and regional in nature—greenhouse gases are dispersed evenly throughout the lower stratosphere, and those atmospheric concentrations are optimally reduced only through a *worldwide* reduction in emissions. To bridge this gap, petitioners rely on the single conclusory statement in one of their declarations that "[i]f the U.S. takes steps to reduce motor vehicle emissions, other countries are very likely to take similar actions regarding

their own motor vehicles using technology developed in response to the U.S. program[.]" JA 239.

This Court has recognized that redressability of injury is most difficult to establish when it "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.). Petitioners' optimistic predictions that if the United States leads, other countries "are very likely" to follow, JA 239, are precisely the type of "unadorned speculation" that is insufficient to confer standing. *Simon*, 426 U.S. at 44. That the speculation is packaged in declarations cannot change the fact that "it is entirely conjectural whether the non-agency activity that affects [petitioners] will be altered or affected by the agency activity they seek to achieve." *Lujan*, 504 U.S. at 571. The declarations are simply insufficient to demonstrate that "relief from the injury [is] 'likely' to follow from a favorable decision." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

As in *Lujan*, if this Court were to remand to EPA, it would be "very much an open question" whether the agency action petitioners seek is "likely to produce" an outcome that alleviates their asserted injuries. *See* 504 U.S. at 568. Because petitioners' alleged injuries are conjectural and far from imminent, and because it is highly speculative whether any such injuries are likely to be redressed by a favorable decision, they do not have standing to sue.

II. The Clean Air Act Does Not Authorize EPA To Regulate Greenhouse Gas Emissions For Purposes Of Controlling Global Climate Change.

When the language of the Clean Air Act is construed in proper context and in accord with its ordinary meaning, it is clear that Congress did not delegate to EPA any authority to regulate greenhouse gas emissions for purposes of affecting

the overall composition of the Earth's atmosphere. The phenomenon of global climate change has been repeatedly debated by Congress and authority to regulate in this area expressly granted to others within the Article II branch.

A. The Text Of The Act Does Not Authorize EPA To Regulate Greenhouse Gas Emissions For Climate Change Purposes.

Statutory construction "'must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). The words of a statute, moreover, "must be read" in "context and with a view to their place in the overall statutory scheme." *Doe v. Chao*, 540 U.S. 614, 630 (2004) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Words and phrases should not be interpreted in "isolation" or strained to the limits of "definitional possibilities." *Dolan v. USPS*, 126 S. Ct. 1252, 1257 (2006). Statutory construction is a "holistic endeavor" that, at a minimum, "must account for a statute's full text, language as well as punctuation, structure, and subject matter." *United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993).

1. The Statute's Plain Language Does Not Authorize EPA Regulation.

Title II of the Clean Air Act authorizes EPA's Administrator to regulate "the emission of any *air pollutant* from ... new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, *air pollution* which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1) (emphasis added). The Act defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, bio-

logical, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g).

The ordinary meaning of "pollution" is the "*[c]ontamination* of air, soil, or water by the discharge of harmful substances." Webster's II New College Dictionary 875 (3d ed. 2005) (emphasis added). Similarly, the ordinary meaning of "pollutant" is "[s]omething that pollutes, esp. a *waste material* that *contaminates* air, soil, or water." *Id.* (emphasis added). In authorizing EPA regulation of "air pollutants," Congress vested the agency with authority to implement controls over emissions of chemicals and substances that *contaminate* the air by making it impure or dirty. *See* 42 U.S.C. § 7401(a) & (b) (the Act's basic purposes are "air pollution prevention" and "air pollution control"). EPA's statutory directive, as the Act's title demonstrates, is to "clean" the air.

This plain and natural reading of the Act's terms is reinforced by Congress's reference to an "air pollution agent," thereby underscoring its intent to focus on substances that contaminate the air we breathe, not naturally occurring compounds that are ubiquitous, life-sustaining components of the Earth's atmosphere. It is further reinforced by the various substances expressly identified as pollutants pursuant to section 302, such as carbon monoxide, hydrocarbons, nitrogen oxides, and particulate matter. *See* 42 U.S.C. § 7602. These are all "pollutants" that dirty the air and, at excessive levels, pose substantial health problems for humans.

Carbon dioxide is substantially different. Unlike other substances EPA has been regulating for over 30 years, carbon dioxide is not an "air pollutant" in any sense of the word. Carbon dioxide is exhaled by every living, breathing human. It is naturally one of the most plentiful compounds in the atmosphere, it is essential to life, and it cannot be understood to "contaminate" the air. *Cf.* Concise Oxford English Dictionary 307 (11th ed. 2004) ("contaminate" means "make

(something) impure by exposure to or addition of a poisonous or polluting substance"). Without carbon dioxide life would not be sustainable on Earth, for the planet would be approximately 30 degrees colder and plants could not engage in essential photosynthesis. *See* EPA Office of Policy, Planning, and Evaluation, Policy Options for Stabilizing Global Climate 2 (Daniel A. Lashof & Dennis A. Tirpak, eds. 1990) (noting the greenhouse effect is, "to a great extent, responsible for making the Earth conducive to life").

Global climate change—which may result in part from long-term shifts in the overall composition of the Earth's atmosphere—is also not an "air pollution" problem. Greenhouse gases such as carbon dioxide and water vapor do not contaminate the air we breathe; rather, they are an integral part of a complex, dynamic climate system. Although increased or decreased levels of these naturally occurring compounds may affect global ambient temperatures, that does not mean that the air is becoming more or less polluted. The textual provisions of the Clean Air Act, which vest EPA with authority to promulgate regulations designed to "clean" the air and make it fit to breathe, cannot be blithely transformed into an immensely broad mandate to reshape the composition of the Earth's atmosphere.

Fighting uphill against the statute's plain and natural meaning, petitioners argue that, because section 302(h) lists "climate" as a relevant "effect[] on welfare," Congress intended EPA to "address concerns about global climate change." Pet. Br. 15. But section 302(h) is a definitional provision that does not delegate regulatory authority—it merely describes the types of effects EPA may consider if a compound is properly classified as an "air pollutant" under the Act.

Petitioners are thus forced to argue that *any* "substance or matter" emitted into the air qualifies as an "air pollutant" that may be subject to EPA regulation. *See* Pet. Br. 12-13. In their view, because "air pollutant" is defined as "any air pol-

lution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air," and because carbon dioxide is a "chemical ... substance ... which ... enters the ambient air," carbon dioxide is an "air pollutant" over which EPA has authority to regulate. *See id.* In fact, however, the only plausible interpretation of the Act—an interpretation consistent with the goal of cleaning the air—is that the "including" phrase in section 302(g) was intended not to expand the scope of the defined term, "air pollutant," but instead to indicate the breadth of substances that could be combined to create an "agent," without uncoupling this subsidiary term from the restrictions inherent in the principal term, "air pollutant." *See Deal v. United States*, 508 U.S. 129, 132-34 (1993) (the meaning of words must be drawn from the context in which they are used). A "substance or matter" must be an "air pollution agent" in order to meet the definition of "air pollutant" under the Clean Air Act. Ubiquitous, naturally occurring compounds such as oxygen, water vapor, and carbon dioxide were not what Congress had in mind.

The glaring flaw in petitioners' reading of the statute is that it relies on bare "definitional possibilities," *Dolan*, 126 S. Ct. at 1257, not a reasonable inquiry into Congress's intent in light of the statute as a whole. *See* Pet. Br. 12-15. Indeed, petitioners' expansive interpretation would lead to the absurd result that EPA would be *required* to consider not just carbon dioxide as an "air pollutant" subject to its regulatory control, but also other naturally occurring, ubiquitous substances in the Earth's atmosphere necessary for life, such as oxygen and water vapor. *See, e.g., Nixon v. Mo. Mun. League*, 541 U.S. 125, 138 (2004) (courts should not construe statutes in a manner that leads to absurd results) (citing *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940)).

Petitioners' proposed interpretation also violates the cardinal "rule against superfluities" in statutory construction.

Hibbs v. Winn, 542 U.S. 88, 101 (2004); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 121 (2004). Under their approach, the words "any air pollution agent or combination of such agents" are superfluous because the definition of "air pollutant" would reach exactly the same universe of emissions with or without that language. Moreover, petitioners' expansive construction is refuted by the Act's 1970 amendments. Before those amendments, section 202 authorized EPA to regulate "the emission of *any kind of substance* ... which in his judgment" merited regulation. Pub. L. No. 90-148, 81 Stat. 485, 499 (1967) (emphasis added). In 1970, Congress changed "any kind of substance" to "any air pollutant" and added, in section 202(a), a definition of "air pollutant" that requires such a substance to be an "agent" of "air pollution." Pub. L. No. 91-604, 84 Stat. 1676 & 1690 (1970). As this Court has often observed, there are few principles of statutory construction "more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987).

Given the plain statutory language, it is not surprising that courts have universally interpreted the Clean Air Act as tackling the problem of dirty air, not global climate change. *See, e.g., Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1117 (D.C. Cir. 1979) ("Congress enacted the Clean Air Act as an attempt *to improve the quality of the air*.") (emphasis added); *Chrysler Corp. v. EPA*, 631 F.2d 865, 869 (D.C. Cir. 1980) (describing carbon dioxide as a "harmless byproduct"). Commentators at the time reflected this view of the Act as concerned with cleaning dirty air rather than influencing the composition of the Earth's atmosphere. *See, e.g.*, Gladwin Hill, *The Politics of Air Pollution: Public Interest and Pressure Groups*, 10 Ariz. L. Rev. 37, 39 (1968) (using the terms "air pollution" and "smog" interchangeably throughout); Joseph D. Coons, *Air Pollution & Government Structure*, 10

Ariz. L. Rev. 48, 52 (1968) (air pollution occurs as the result of concentrations of localized, ground-level contaminants). In fact, *no* case, in almost forty years of history of the Clean Air Act, supports the view, much less suggests, that the statute's measures against "air pollution" were intended to address the phenomenon of global climate change.

2. The Statutory Scheme Does Not Contemplate EPA Regulation.

That Congress did not intend to grant EPA authority to regulate greenhouse gases for global climate change purposes is confirmed by reading the statutory text "in its proper context." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004).

The Clean Air Act establishes an "intergovernmental partnership to regulate air quality in the United States." *Mich. v. EPA*, 268 F.3d 1075, 1078 (D.C. Cir. 2001). The Act is premised on state and local planning that "cleans" the air by bringing local air contaminants to levels at or below the federal standards set by EPA. Specifically, the Act makes EPA responsible for establishing NAAQS, *see* 42 U.S.C. § 7409, which the States then attain and maintain through state implementation plans. *Id.* § 7407. The premise of this framework is that each region (and each metropolitan area) of the country is capable of complying with the NAAQS by adopting regulatory controls that affect local ambient levels of the relevant pollutants. *See Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1285 (D.C. Cir. 2000). Each State controls local emissions "as may be necessary" to achieve attainment in designated, localized non-attainment areas and, as a result, controls may differ from one such area to another. 42 U.S.C. § 7410(a)(2)(A); *see Union Elec. Co. v. EPA*, 427 U.S. 246, 266 (1976).

All of the substances that Congress (and in one instance EPA) has listed as criteria pollutants—lead, sulfur dioxide, oxides of nitrogen, carbon monoxide, particulate matter, and

ozone—present local ambient air pollution problems that can reasonably be addressed on a *local* or *state* level, or at most a regional level. The concentrations of each of these substances vary from place to place, primarily as a result of differences in local emissions, local weather, and topography. Some pollutants, particularly ozone precursors, can transport from one locality to another and thus raise regional concerns. But excessive ozone levels are a local air pollution problem with ambient concentrations *differing* from locality to locality, resulting in discrete ozone non-attainment areas. The local nature of the core problems attacked by the Clean Air Act has been well noted: "Air pollution becomes evident in specific local areas, rather than on a global basis .... The term 'airshed' has come into use to designate such local areas. The principal characteristic of an airshed is that contaminants do not normally cross its boundaries, in either direction, in such amounts or concentrations as to cause significant effects." Coons, 10 Ariz. L. Rev. at 60.

Global climate change, by contrast, involves the entire atmosphere's ability to reflect and retain heat, and is not a localized phenomenon. Greenhouse gases are not like the criteria pollutants for which EPA is required to establish NAAQS because they have relatively long lifetimes, which, in combination with other atmospheric dynamics, cause them to mix uniformly in the atmosphere. Levels of carbon dioxide and other greenhouse gases "over" any particular locality are therefore not influenced by local or upwind emissions. The potential for either adverse or beneficial effects in the United States from motor vehicle carbon dioxide emissions depends on complicated interactions of many variables on the land, in the oceans, and in the atmosphere, occurring around the world across long periods. Analysis of these effects and their relation to the atmospheric concentration of carbon dioxide in the United States would present EPA with "scientific issues of unprecedented complexity in the NAAQS context." Pet. App. A-73.

More significantly, EPA must set NAAQS at a level "requisite to protect the public health" within an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). Because atmospheric concentrations of carbon dioxide and other greenhouse gases are consistent globally, an effective carbon dioxide NAAQS would require the United States to mitigate effects for the entire world in order to mitigate effects for itself. If EPA had authority to set such a standard, it would be unable to consider the cost to the United States of solving global warming for the entire world because consideration of cost is forbidden when EPA establishes a NAAQS. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 464 (2001).

Domestic regulation of global climate change is thus impractical under the Act. Moreover, such unilateral action could lead to economic calamities, especially in the face of rapidly increasing emissions from the developing world. For example, China is expected to become the greatest emitter of carbon dioxide by 2015. EPA arguably would need to classify the entire United States as a carbon dioxide nonattainment area, triggering obligations to reduce worldwide carbon dioxide emissions that could cripple the United States economy. Such use of the NAAQS framework demonstrates why Congress could not have possibly intended to grant EPA authority to regulate carbon dioxide as an "air pollutant" under the Act. *Cf. Brown & Williamson*, 529 U.S. at 137 (rejecting FDA jurisdiction over cigarettes in part because "were the FDA to regulate cigarettes and smokeless tobacco, the Act would require the agency to ban them," a result Congress had "foreclosed").

Petitioners do not meaningfully dispute that regulating greenhouse gas emissions for purposes of affecting global climate change cannot be practically accomplished through the NAAQS program. Instead, they argue that the NAAQS program in Title I is separate from the mobile source program in Title II. *See* Pet. Br. 27-29. In their view, the Court should not consider the statutory structure because whether

EPA is required to establish a NAAQS for carbon dioxide and other greenhouse gases is not "before this Court." *Id.* at 29.

In fact, however, section 302's definition of "air pollutant" is central to the operation of the Clean Air Act as a whole. The definition of "air pollutant" applies not only to Title II, which authorizes EPA to regulate motor vehicle emissions, but also to Title I, which requires EPA to establish national ambient air quality standards for "criteria pollutants." 42 U.S.C. § 7408(a)(1)(A). Specifically, Title I of the Act requires the EPA Administrator to designate as a criteria pollutant—and establish a NAAQS for—"each *air pollutant*" that "cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* (emphasis added)

Petitioners suggest that under Title I, unlike Title II, EPA may at its discretion not "issue air quality criteria" for air pollutants deemed to endanger public health and welfare. Pet. Br. 28 (arguing that Title I and Title II have different "regulatory triggers"). But that interpretation of the statute has been rejected. *See, e.g., NRDC, Inc. v. Train*, 545 F.2d 320, 327-28 (2d Cir. 1976). If a compound emitted from either a mobile or statutory source qualifies as an "air pollutant" subject to EPA regulation, and if, in the Administrator's "judgment," regulation is appropriate because the pollutant "may reasonably be anticipated to endanger public health or welfare," a NAAQS is "mandatory." *Id.*

The language used in Title I is identical in all material respects to the language used in Title II. *Compare* 42 U.S.C. § 7408(a) *with* 42 U.S.C. § 7521(a)(1). Both convey authority to regulate "*air pollutant[s]*" as defined in section 302(g), provided that, in EPA's judgment, such pollutants "may reasonably be anticipated to endanger public health or welfare." Indeed, the two titles require EPA to implement different sorts of regulations for the same pollutants. Congress included only one additional requirement to Title II's explica-

tion of a criteria pollutant when penning Title I: the pollutant must "[result] from numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408(a)(1)(B). But a motor vehicle, the emissions of which EPA regulates under section 202(a)(1), constitutes precisely the sort of "numerous" and "diverse" "mobile ... [source]" contemplated by Congress in Title I. Regulatory authority over "air pollutants" under Title I and Title II is *coterminous*. Accordingly, if EPA has jurisdiction under section 202(a)(1) to regulate carbon dioxide, it also has jurisdiction under section 108(a)(1), which *requires* establishment of a NAAQS for criteria pollutants.

B. Regulatory History Confirms That EPA Lacks Authority To Regulate Greenhouse Gas Emissions For Climate Change Purposes.

Not only has carbon dioxide never been defined or regulated as a "pollutant" under the Act, the consistent history of regulation under the Act shows quite the opposite. For over thirty years, EPA has been identifying other pollutants and attacking the problems they pose by reducing their quantity, a process that routinely operates by transforming those pollutants into compounds the agency and courts have regarded as clean and "harmless by-products." *Chrysler Corp.*, 631 F.2d at 869 (catalytic converters produce "two harmless byproducts, carbon dioxide and water"); EPA, A Citizen's Guide to Chemical Oxidation 1 (2001), http://www.epa.gov/tio/download/citizens/oxidation.pdf ("Oxidants help change harmful chemicals into harmless ones, like water and carbon dioxide."). Principal among these non-pollutant by-products has been carbon dioxide.

EPA's consistent treatment of carbon dioxide as a non-pollutant is seen in its implementation of section 202(a)(4)(B) of the Act, which requires the Administrator to consider "whether and to what extent the use of any device, system, or element of design causes, increases, reduces, or eliminates emissions of any unregulated pollutants." 42 U.S.C. § 7521(a)(4)(B). EPA is required to undertake this

inquiry to determine if the compliance device creates an unreasonable risk of harm, and if so, the device is banned under section 202(a)(4)(A). This provision was adopted specifically to regulate catalytic converters. If carbon dioxide were in fact a pollutant, then EPA has been obligated since 1978 to consider the harms that carbon dioxide might produce, because the intended effect of catalytic converters is to reduce unburned hydrocarbons and carbon monoxide by increasing carbon dioxide emissions. But EPA has never done so, undoubtedly because it has never understood carbon dioxide to be an "air pollutant." *See, e.g., Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (Congress's "failure to repeal or revise" a statute in face of a long-standing administrative interpretation has been found to be "persuasive evidence that that interpretation is the one intended by Congress"); *Haig v. Agee*, 453 U.S. 280, 297-98 (1981) (same).

A perfect engine—that is, one able to achieve complete combustion—will produce only two things: carbon dioxide and water. *See, e.g.*, D. J. Patterson & N. A. Henein, Emissions from Combustion Engines and Their Control 97 (1972); Daniel Velez, *No Fault Remediation of MTBE*, 26 Wm. & Mary J. Envtl. L. & Policy Rev. 477, 480-81 (2001). But engines are not perfect, and some of the hydrocarbons in gasoline are not fully combusted in the engine. *See* Patterson & Henein, *supra*, at 97; J. Robert Mondt, Cleaner Cars: The History & Technology of Emission Control Since the 1960s 25 (2000). As a result, in addition to emitting carbon dioxide, internal combustion automobiles also emit unburned hydrocarbons (known as "volatile organic compounds"), which are clearly designated as pollutants. *See* Patterson & Henein, *supra*, at 117-29.

EPA has long regulated the emission of unburned hydrocarbons from motor vehicles. *See* Mondt, *supra*, at 81; *see also* Standards for Exhaust Emissions, Fuel Evaporative Emissions, & Smoke Emissions Applicable to 1970 & Later Vehicle Engines, 33 Fed. Reg. 8304, 8306 (June 4, 1968).

To comply with these regulations, manufacturers effectively use two strategies: improve engine technology to achieve more complete combustion, *see, e.g.*, Patterson & Henein, *supra*, at 143, and use catalytic converters, which convert unburned hydrocarbons to water and carbon dioxide. *See* Mondt, *supra*, at 84; 40 C.F.R. § 85.2122(a)(15)(ii)(A) (defining "catalytic converter" as a device that "oxidize[s] hydrocarbon (HC) and carbon monoxide (CO) emissions to carbon dioxide (CO_2) and water (H_2O)"). In either of these events, what would otherwise be emitted as unburned hydrocarbons is converted instead into carbon dioxide, thus increasing the amount of carbon dioxide emitted by the motor vehicle.

Automobiles also emit small quantities of carbon monoxide if there is inadequate oxygen during combustion or when combustion does not proceed for long enough to allow the complete oxidation of all carbon into carbon dioxide. *See* Mondt, *supra*, at 26. Again, there are two ways to address this impurity: improve combustion within the engine so that more carbon is fully oxidized into carbon dioxide, and install catalytic converters that promote the oxidization of carbon monoxide into carbon dioxide before it leaves the tailpipe. *See, e.g.*, EPA, Automobiles and Carbon Monoxide 2 (1993), http://www.epa.gov/otaq/consumer/03-co.pdf. Either option increases the amount of carbon dioxide emitted because carbon monoxide, as a pollutant, has successfully been converted into carbon dioxide, a clean and harmless by-product.

Congress and EPA support these techniques in at least two ways. First, the Clean Air Act requires the use of oxygenated gasoline in carbon monoxide non-attainment areas. *See* 42 U.S.C. § 7545; *see also Exxon Mobil Corp. v. EPA*, 217 F.3d 1246 (9th Cir. 2000). Because carbon monoxide is produced when there is not enough oxygen present during combustion, "[t]he extra oxygen in oxygenated fuels helps ensure that the engine produces carbon dioxide instead of carbon monoxide." Thomas O. McGarity, *MTBE: A Precau-*

tionary Tale, 28 Harv. Envtl. L. Rev. 281, 284 n.10 (2004). Second, "[b]ecause lead emissions interfere with the operation of the catalytic converters" on newer automobiles, EPA "issued regulations requiring the sale of unleaded gasoline for the protection of those devices." *Amoco Oil Co. v. EPA*, 543 F.2d 270, 271 (D.C. Cir. 1976). Given this robust support from EPA and the Congress of several different processes that turn actual air pollutants into carbon dioxide, it is unsurprising that commentators have noted that "society has long encouraged and required automobile manufacturers and stationary sources to achieve more complete combustion to produce carbon dioxide rather than carbon monoxide and other hydrocarbons that are dangerous to human health." Gary E. Marchant, *Freezing Carbon Dioxide Emissions: An Offset Policy for Slowing Global Warming*, 22 Envtl. L. 623, 662 (1992).

In short, for more than thirty years, EPA has never defined carbon dioxide as a pollutant subject to regulatory control. To the contrary, for that same lengthy period of regulatory practice, the agency has presided over an intricate web of regulations that have addressed air pollutants from motor vehicles by invoking and approving industry processes that transform those impurities into clean and harmless by-products such as carbon dioxide and water vapor. This long-standing regulatory practice is dramatically inconsistent with petitioners' claim that carbon dioxide must be classified as a pollutant under the Act without more explicit action from Congress.

C. The Legislative History Contains No Indication That Congress Intended EPA To Regulate Greenhouse Gas Emissions For Climate Change Purposes.

In addition to the Clean Air Act's text and structure, the legislative history further confirms that Congress did not intend to delegate to EPA far-reaching authority to regulate

greenhouse gases for purposes of addressing the phenomenon of global climate change.

The Clean Air Act was commonly understood as authorizing EPA to address the pressing air pollution problems of the day: smog and smoke pollution. For example, Representative Helstoski, one of the Act's key supporters, made remarks that were squarely focused on these issues. *See* 111 Cong. Rec. H25,061, col. 3 & H25,062, col. 1 (Sept. 24, 1965) (citing the example of the New Jersey Turnpike, which was "compelled to close ... at least 20 times a year" because of smog). Similarly, when the architect of the 1970 amendments introduced the bill to the Senate for debate, he stated: "This bill states that all Americans in all parts of the Nation should have *clean air to breathe*, air that will have no adverse effects on their health." 116 Cong. Rec. S32,901 (Sept. 21, 1970) (Statement of Sen. Muskie) (emphasis added).

No reasonable reading of the legislative history leads to the conclusion that Congress intended to have EPA regulate carbon dioxide emissions for purposes of affecting the global climate. To be sure, petitioners have located a few isolated references to climate dating back to 1965. But these isolated references deserve no weight because they are "in no way anchored in the text of the statute." *See Shannon v. United States*, 512 U.S. 573, 583 (1994) ("We are not aware of any case ... in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute.") Nor can "a single outlying statement ... stand against a tide of context and history." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 599 (2004). Here, the legislative history presents more of a tsunami than a tide to refute petitioners' claims about congressional intent, making clear instead that the "common experience," "common usage," and "commonplace conception" of Congress do not support a conclusion that carbon dioxide is an air pollutant. *Cf. id.* at 586-600 (using legislative history

and common usage to interpret the term "age" in the ADEA to mean only "old age").

When Congress first enacted section 202, Congressman Helstoski mentioned that "[it] has been predicted that by the year 2000, the amount of atmospheric carbon dioxide may have increased by about fifty percent; and many believe that this will have a considerable effect on the world's climate." 111 Cong. Rec. H25,061. But Representative Helstoski's brief reference to the potential effects of atmospheric carbon dioxide on climate was not followed by any indication that he thought that the pending legislation addressed the problem. His remarks on the purpose and effect of the bill related only to the goal of cleaner air. *See, e.g.*, 111 Cong. Rec. at H25,061-62.

Likewise, although the 1970 amendments added an express reference to climate, the legislative history does not support the claim that EPA thereby gained authority to promulgate regulations designed to address the atmosphere's ability to manage radiation from the sun. *See* Pub. L. 91-604, § 15(a)(1), 84 Stat. 1676, 1710 (1970), *reprinted in* 1970 U.S.C.C.A.N. 1954, 1997. The statements petitioners cite from the legislative history of the Act's 1977 amendments do not even relate to greenhouse gases, but instead concern "radioactive air pollution from nuclear power plants," H.R. Rep. No. 95-294, at 42, 95th Cong., 1st Sess. (1977), and "fine particulate emissions," which were already regulated under Title I of the Act. *Id.* at 339. During debate on the amendments, Senator Boggs introduced into the record the Council on Environmental Quality's First Annual Report, which explained that "Air pollution alters climate and may produce global changes in temperature.... [T]he addition of particulates and carbon dioxide in the atmosphere could have dramatic and long-term effects on world climate." 116 Cong. Rec. S32,912-16. But no provision was made to regulate this global phenomenon; to the contrary, the Report suggests the federal government should take *multilateral, cooperative*

steps and use *alternative* measures to address the problem of global climate change. *Id.* at S32,917, col. 2. Furthermore, a table in the report reinforces the view that carbon dioxide is not an "air pollutant" because it lists sulfur oxides, hydrocarbons, particulates, nitrogen oxides, and carbon monoxide as pollutants, but not carbon dioxide. *Id.* at S32,912, col. 3.

The legislative history behind the 1990 amendments yields perhaps the clearest statement of all. The amendments originally included a section that explicitly required EPA to set carbon dioxide emission standards for motor vehicles. *See* 136 Cong. Rec. S6479 (1989). But that section was omitted from the ultimate legislation. Senator Symms analyzed the unsuccessful provision as follows:

> A carbon dioxide tailpipe standard in the Committee bill is a clear abuse of the federal motor vehicles emissions standards program, and an unprecedented and not-too-covert attempt to usurp an issue within the jurisdiction of the Senate Commerce Committee. Carbon dioxide *is not an air pollutant*—it possesses no physical, chemical, biological, or radioactive property that presents, in and of itself, a threat to public health or welfare. To regulate such a substance through an emission standard under title II of the Clean Air Act flies in the face of the clear and express purpose of the Act, "to prevent and control *air pollution*.

S. Rep. No. 101-228, at 439 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3819 (first emphasis added; footnote omitted). Contrary to petitioners' suggestions, *see* Pet. Br. 21, there is no indication whatever that Congress omitted the unsuccessful provision because it believed that EPA already possessed authority under the Clean Air Act to regulate greenhouse gases.

In fact, since 1990, Congress has considered and rejected several bills that would have conferred such authority on

EPA. *See, e.g.*, S. 139, 108th Cong. (2003) ("Climate Stewardship Act of 2003" would have allowed EPA to regulate greenhouse gas emissions (particularly those of CO_2), but failed in the Senate by a 43-55 vote). The issue of global climate change has been the subject of dozens of hearings and briefings before various congressional committees, and regulatory and non-regulatory legislation has been repeatedly introduced and re-introduced in Congress. There is no indication whatsoever that these legislative deliberations occurred in a context of Congress being persuaded that EPA *already had* such authority (without exercising it) under existing law.

In sum, the common understanding and usage evident from the legislative history confirms that Congress did not delegate to EPA the authority to regulate emissions of greenhouse gases when it enacted and amended the Clean Air Act. Carbon dioxide was not considered to be an "air pollutant." Rather, Congress was focused in the Clean Air Act and its later amendments on traditional, local air quality concerns such as smog and acid rain.

D. Petitioners' Interpretation Of EPA's Authority Cannot Be Reconciled With Other Statutes Addressing Climate Change And Fuel Economy Standards.

Given the text, structure, and history of the Clean Air Act, petitioners must seek from Congress the authority they are trying to obtain from the courts. Under petitioners' regime, latent authority in the Clean Air Act would give EPA immense control over the United States' economy, foreign policy, and national security. This country would be forced to make reductions in consumption of fossil fuels that could devastate the economy and scuttle any leverage for a multilateral agreement on climate change. It is a tenet of statutory interpretation, as well as constitutionally informed common sense, that Congress does not "delegate a decision of such economic and political significance to an agency in so cryptic

a fashion." *Brown & Williamson*, 529 U.S. at 160; *see MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994). In addition, this errant construction cannot be reconciled with the deference EPA is properly afforded based on its consistent construction of its own governing statutes, over decades, as not conferring the authority to go beyond cleaning dirty air to regulating carbon dioxide emissions and the overall composition of the Earth's atmosphere. *See United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984).

1. Congress Has Addressed Global Climate Change In Other Statutes.

In the past three decades, Congress has held dozens of hearings on the subject of greenhouse gas regulation and has enacted major legislation specifically addressing the issue. In fact, Congress has directly addressed global climate change in no fewer than *six* other statutes. *See, e.g.*, National Climate Program Act, Pub. L. No. 95-367, 92 Stat. 601 (1978); Global Climate Protection Act of 1987, Pub. L. No. 100-204, 101 Stat. 1331 (1987); Global Change Research Act of 1990, 15 U.S.C. § 2931 *et seq.* (1990); Food, Agriculture, Conservation, and Trade Act of 1990, Title XXIV, Pub. L. No. 101-624, 104 Stat. 3359, §§ 2401-2412 (1990); Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992); Alternative Motors Fuel Act of 1988, Pub. L. No. 100-494, 102 Stat. 2441 (1988). Where, as here, two or more statutes address a specific regulatory issue, "[c]ourts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit." *NLRB v. Drivers, Chauffeurs, Helpers Local Union No. 639*, 362 U.S. 274, 291-92 (1960); *United States v. Fausto*, 484 U.S. 439, 453 (1988) (same). Here, the history of intensive legislative deliberation makes clear that Congress has created a "distinct regulatory scheme" for the problem of global climate change that would be usurped if EPA were to regulate

carbon dioxide under the Clean Air Act. *Brown & Williamson*, 529 U.S. at 144.

In addition, Congress has established a regulatory framework outside of the Clean Air Act that directly addresses motor vehicle fuel economy and carbon dioxide emissions. The implication of that statutory framework "precludes any role for" EPA under the Clean Air Act. *Brown & Williamson*, 529 U.S. at 144. In particular, in the Energy Policy and Conservation Act, Congress has set forth a detailed regulatory scheme by which the Department of Transportation, through NHTSA, sets mandatory fuel-economy standards at a "*maximum* feasible" level. 49 U.S.C. § 32902(a) (emphasis added). Compliance with the federal fuel-economy standards is measured largely by monitoring carbon dioxide emissions, because there is a direct chemical connection between the amount of fuel an automobile uses and the amount of carbon dioxide it emits. Unlike pollutants regulated by the Clean Air Act, no technology exists to capture or convert carbon dioxide released from motor vehicles powered by gasoline or diesel fuel; it can be reduced only by improving fuel economy. *See* Pet. App. A-79.

The regulatory program established by Congress's enactment of EPCA reflects a political compromise that carefully sets "maximum feasible" fuel economy standards by balancing matters of "environmental [policy,] ... engineering design, safety, national energy policy, international competitiveness and trade." S. Rep. No. 101-228, at 441 (1990), 1990 U.S.C.C.A.N. 3385, 3820 (Sen. Symms). This compromise marks the place where "opposing social and political forces have come to rest." *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (noting in the context of interpreting the APA that courts must respect legislative balances set by Congress); *see also Average Fuel Economy Standards for Light Trucks Model Years 2008-2011*, 71 Fed. Reg. 17,566, 17,654 (Apr. 6, 2006) (discussing EPCA's careful balance of policies). EPA regulation of carbon dioxide motor vehicle

emissions is fundamentally at odds with the EPCA program and would shatter that delicate political balance. An EPA standard more stringent than those promulgated under EPCA "would make mute all laws and regulations dealing with corporate average fuel economy (CAFE)" and render the fuel-economy standard "a 'deadwood' artifact of law with no consequence." S. Rep. No. 101-228, at 439 (1990), 1990 U.S.C.C.A.N. 3385, 3820 (Sen. Symms) (discussing failed section 206 of the 1990 Clean Air Act amendments).

It is unlikely that Congress would provide for the comprehensive regulation of motor vehicle fuel economy by NHTSA without addressing EPA's purportedly far greater authority over the subject. *Cf. Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("'In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, ... judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.'") (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)). This is hardly an "interstitial matter" Congress would implicitly leave to one agency in such a backhanded manner after expressly and specifically authorizing another agency to set standards pursuant to a mandatory balancing test.

2. When Congress Has Wanted EPA To Address Global Environmental Issues, It Has Created A New Statutory Framework.

Congress has previously dealt with emissions issues relating to non-localized gases that implicate global environmental concerns. For example, when Congress addressed stratospheric ozone depletion it used an *express delegation* under a new regulatory framework: Title VI of the Clean Air Act, 42 U.S.C. §§ 7671-7671q. The addition of Title VI to combat global issues reflects Congress's views about the regulatory limits of Titles I and II of the Act.

Much like carbon dioxide, anthropogenic substances that deplete stratospheric ozone are emitted around the world and are very long-lived. Their upper-atmosphere ozone depleting effects—and the consequences of those effects—occur on a global scale. The problem does not manifest itself in the ambient air, but rather in a depletion of the ozone layer some 26,000 to 52,000 feet above sea level, depending on latitude, and continuing up to approximately 160,000 feet. Because of the unique chemistry of polar stratospheric clouds and pollutants from countries across the globe, ozone holes have developed primarily over the poles of the earth, and the ozone layer continues to deplete on a seasonal basis.

Congress did not regard Titles I or II—or the definitions in section 302—as having *already* delegated authority to EPA to address such global environmental issues. Instead, Congress added specific provisions on stratospheric ozone depletion and urged negotiation of international agreements ensuring global participation to research and regulate stratospheric ozone-depleting substances. *See* 42 U.S.C. §§ 7450-7459 (repealed 1990). These new provisions did not result in meaningful action, however, and Title VI ultimately replaced them in the 1990 amendments, providing that EPA will coordinate with developing countries to implement the Montreal Protocol, 42 U.S.C. § 7671p(b), and *expressly delegating* authority to EPA to regulate specified ozone-depleting substances, *id.* § 7671c-d. Importantly, Congress saw Title VI as "an *expansion of existing statutory authorities*." S. Rep. No. 101-228, at 387 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3770 (emphasis added). The same holds for any EPA regulation of motor vehicle carbon dioxide emissions—Congress would need to provide the agency with specific statutory authority.

Petitioners note that the 1990 amendments to the Clean Air Act contain a few references to carbon dioxide and global warming generally. *See* 42 U.S.C. § 7403(g); 42 U.S.C. § 7671a(e); Pub. L. No. 101-549, § 821 (1990), *modifying* 42

U.S.C. § 7651k(b) & (c). But in each provision, Congress expressly refused to grant EPA authority to regulate carbon dioxide. *See* 1990 Clean Air Act Leg. Hist. 2667, 2776-78 (Reps. Roe and Smith); Pet. App. A-71-A-72. Each provision of the 1990 amendments relating to carbon dioxide—sections 103(g), 602(e), and 821—calls on EPA not to regulate but to develop information concerning global climate change. Section 103(g) gives the Administrator the authority to research and implement demonstration programs for air pollution prevention. This includes creating "nonregulatory" strategies to control carbon dioxide emissions from stationary sources. 42 U.S.C. § 7403(g). But section 103(g) expressly provides that nothing in the subsection "shall be construed to authorize the imposition on any person of air pollution control requirements."

To further emphasize this point, Congress amended section 103(g) in conference to include the term "nonregulatory" to describe the "strategies and technologies" it was intended to promote. This point is underscored in the House Conference Report and by the fact that the section repeats the phrase "nonregulatory strategies" five times. H.R. Conf. Rep. No. 101-952, at 349 (1990), as reprinted in 1990 U.S.C.C.A.N. 3867, 3881; *see also* 42 U.S.C. § 7671a(e) (directing EPA to determine the "global warming potential" of substances that deplete stratospheric ozone, but containing language similar to section 103(g) stating that it "shall not be construed to be the basis of any additional regulation under this Chapter"). These specific reservations of the power to regulate, carefully added to provisions that instead direct EPA to research and implement demonstration programs, would make no sense if Congress had implicitly given EPA immense and largely unrestricted authority to regulate the composition of the Earth's atmosphere. *Cf. Dir. of Revenue v. CoBank ACB*, 531 U.S. 316, 324 (2001) (rejecting interpretation that would assume "Congress made a radical—but entirely implicit—change" in the statutory scheme).

3. Congress Has Declined To Delegate EPA Authority To Regulate Carbon Dioxide Emissions From Motor Vehicles.

The decision in *Brown & Williamson* is instructive here. There the Court addressed FDA's conclusion that tobacco products constituted "drug delivery devices" and therefore fell within FDA's regulatory jurisdiction. 529 U.S. at 127. Despite language in the statute that arguably supported FDA's position, this Court found that "Congress has directly spoken to the issue" and "precluded the FDA's jurisdiction to regulate tobacco products." *Id.* at 133. Relying on the logical implications of FDA regulation and Congress's tobacco policy—as expressed in other tobacco regulations and repeated refusals to explicitly grant FDA authority—the Court found that Congress had not intended FDA regulation. *Id.* 133-59. In the end, the Court emphasized that it must "be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Id.* at 133.

To avoid this Court's conclusion that Congress does not cryptically delegate important issues to agencies, petitioners have argued that because FDA had repeatedly expressed the view it did not have jurisdiction, whereas EPA was silent until the Clinton Administration, *Brown & Williamson* does not apply. This Court, however, found that point to be "not crucial" and not "determinative," using it only to "bolster[] the conclusion" that the separate regulatory regime was based on the lack of FDA authority. *Id.* at 157.

Petitioners also stress the Court's finding in *Brown & Williamson* that FDA regulation would require a total ban on tobacco, whereas EPA regulation of greenhouse gases would only result in new emission standards. Yet such regulation would so dramatically expand EPA's authority and have such far-reaching consequences that Congress would not adopt it obliquely. Moreover, petitioners never come to grips with

the potentially devastating effects of such regulation for the U.S. economy. The production of energy from fossil fuels—the power source for nearly all modes of transportation and about 85 percent of domestic energy—directly results in carbon dioxide emissions. In fact, when considering the United Nations Framework Convention on Climate Change, the Senate found that reductions in carbon dioxide emissions could potentially "cost American workers hundreds of thousands of their jobs and cost the economy more than $90 billion of gross national product" from 1990-2000. 138 Cong. Rec. S17,150-01, S17,155 (Oct. 7, 1992) (Statement of Sen. Craig).

In addition to its economic impact, any regulation of carbon dioxide emissions by EPA has important implications for American foreign policy. Global climate change must be addressed multilaterally. In more than a decade of debate on global climate change, Congress has recognized that coordinated international action, among developing and developed countries, is needed to address the problem adequately. In fact, finding that EPA has implied authority under the Clean Air Act to regulate greenhouse gas emissions would conflict directly with the Department of State's *express statutory authority* to negotiate a global solution to this problem. *See* Global Climate Protection Act of 1987, 15 U.S.C. § 2901 (historical and statutory notes).

This is therefore one of those "extraordinary cases" in which "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Brown & Williamson*, 529 U.S. at 159. In view of the complexity of global climate change and the host of interests that any workable solution must accommodate, it is absurd to presume that Congress implicitly delegated authority to EPA, more than thirty years ago, to address an issue that Congress has struggled with ever since. In sum, Congress to date has declined to give EPA the authority to regulate carbon dioxide, and the Court should respect that decision.

III. EPA Properly Exercised Its Broad Discretion In Declining To Make An Endangerment Finding.

The Clean Air Act does not authorize EPA to regulate carbon dioxide, water vapor, or other greenhouse gases emitted by motor vehicles for purposes of affecting global climate change. The Court therefore need not reach the question whether EPA, as an alternate basis for its decision, properly exercised its broad discretion not to engage in rulemaking. But if this Court were to reach that issue, petitioners still would not prevail, because their argument disregards the broad—and effectively nonreviewable—discretion that EPA enjoys under the statute in making that type of decision.

A. EPA Possesses Broad Inherent Discretion When Determining Whether To Initiate Rulemaking Proceedings.

Agencies have substantial discretion when determining whether to initiate proceedings in response to a petition for rulemaking. EPA's decision not to commence regulation of greenhouse gas emissions is a quintessential and eminently reasonable example of such discretionary decision-making.

Because agencies have finite financial resources and limited human capital, they cannot possibly initiate rulemaking proceedings in response to every petition—meritorious or otherwise—they receive. As this Court recognized in the analogous context of an agency's refusal to initiate enforcement proceedings, agencies must prioritize their regulatory efforts based on "a complicated balancing of a number of factors" that are peculiarly within the agency's expertise. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Because an agency must assess whether it "is likely to succeed if it acts," whether the "particular enforcement action requested best fits the agency's overall policies," and "whether the agency has enough resources to undertake the action at all," an agency "is far better equipped" than a court "to deal with the many variables involved in the proper ordering of its priorities."

Id. at 831-32. This Court has therefore concluded that agency decisions not to commence enforcement proceedings are presumptively nonreviewable. *Id.* at 837; *see also Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (an agency's allocation of funds from a lump-sum appropriation is committed to agency discretion and thus nonreviewable).

This Court has never expressly considered whether the denial of a petition for rulemaking is—like the refusal to initiate an enforcement action—presumptively nonreviewable. *Heckler*, 470 U.S. at 825 n.2 (noting that the question was not presented). *Heckler* and its progeny, however, demonstrate that, *at a minimum*, agencies possess significant discretion in determining whether to commence rulemaking proceedings because such decisions touch on delicate issues—including allocating scarce agency resources and establishing administrative priorities—that generally cannot be reviewed under judicially manageable standards. *See WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981) ("only in the rarest and most compelling of circumstances" will a court "overturn an agency judgment not to institute a rulemaking"). As courts have recognized, "an agency's refusal to initiate a rulemaking is evaluated with deference so broad as to make the process akin to non-reviewability." *Nat'l Mining Ass'n v. DOI*, 70 F.3d 1345, 1352 (D.C. Cir. 1995) (internal quotation marks and citations omitted).

Here, EPA relied primarily on the uncertainty in the scientific evidence to conclude that, even if Congress had granted it broad authority to regulate the global climate, it would be inappropriate to begin regulating vehicular greenhouse gas emissions. Notwithstanding petitioners' assertions that a link exists between anthropogenic greenhouse gas emissions and long-term changes in climate, EPA's decision correctly—and prudently—observed that there is much that scientists do not understand about the causal connection between greenhouse gases and the Earth's surface temperatures. As the National Research Council (NRC) concluded in a

2001 report, *Climate Change Science: An Analysis of Some Key Questions*, it is impossible to "rule out that some significant part of" the climate change observed over recent decades is a "reflection of natural variability" in the Earth's temperature. JA 151. In light of the "considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases and aerosols," the NRC cautioned that "current estimates of the magnitude of future warming should be regarded as tentative and subject to future adjustments (either upward or downward)." JA 152; *see also* Pet. App. A-70 (quoting the conclusion of the United Nations Framework Convention on Climate Change that "there are many uncertainties in predictions of climate change, particularly with regard to the timing, magnitude and regional patterns thereof"). And the NRC ultimately concluded that given "the large and still uncertain level of natural variability inherent in the climate record ... a causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established." JA 193. Even today, the state of the science is far from certain. *See* Amicus Curiae Brief of Climatologists and Scientists Sallie Baliunas, *et al.* at 5 ("claims in the [amicus brief filed in support of petitioners] that harm from carbon dioxide emissions is 'virtually certain,'" and "that new studies support that certainty, are simply incorrect"); *see also id.* at 8-9 (the atmosphere is a "complicated system," and predictions about the effect of increased emissions ignore the "highly significant" effect of "substantial natural negative feedback mechanisms" that could moderate any warming and "may even be strengthened by higher greenhouse gas concentrations").

These scientific uncertainties are compounded when the focus properly shifts from petitioners' broad claims concerning the potential link between worldwide greenhouse gas emissions and global climate change to the narrow issue of the effect that emissions from new motor vehicles or new

motor vehicle engines within the United States might have on the global climate. Because the *entire* U.S. transportation sector accounts for only seven percent of global fossil fuel emissions, JA 238, EPA was justifiably wary of the scientific link between emissions from a *portion* of that sector and injury to the public welfare from global climate change.

This is not to say that there is a complete absence of scientific evidence suggesting that anthropogenic greenhouse gas emissions are causally linked to global warming. *See, e.g.*, JA 151, 154. But it was reasonable for EPA's environmental experts to conclude that, even if carbon dioxide were an "air pollutant" subject to EPA regulation, scientific uncertainty militates against regulation, at least until EPA has the benefit of ongoing, congressionally funded research on global climate change. The soundness of EPA's conclusion is bolstered by the federal voluntary emissions reduction programs that are already measurably reducing greenhouse gas output in the United States. *See* Pet. App. A-89, A-90. In these circumstances, there is simply no basis for this Court to displace EPA's decision to focus its finite regulatory resources, at least for now, on environmental issues that are free of scientific doubt and not already being addressed through other remedial measures.

Apart from the evidence of scientific uncertainty, EPA also identified several other reasons why, even if Congress had granted it statutory authority to regulate greenhouse gases, it would have denied the rulemaking petition. These reasons included (i) the inefficiency of regulating greenhouse gas emissions from new motor vehicles but not from other emissions sources; (ii) concerns that other countries would increase their greenhouse gas output in response to efforts by the United States to limit emissions; and (iii) the lack of available technology to control emissions of greenhouse gases other than carbon dioxide. *See* Pet. App. A-85-A-87. These additional reasons identified by EPA suggest that the agency would *not* succeed if it attempted to reduce green-

house gas output through regulations directed at emissions from new motor vehicles. *See Heckler*, 470 U.S. at 831 (an agency should consider whether it "is likely to succeed if it acts"). EPA thus made the eminently reasonable determination that, even if carbon dioxide, water vapor, and other greenhouse gases were "air pollutants" within the meaning of the Clean Air Act, EPA's limited "resources are best spent" on other regulatory priorities. *Id.* It would be a profound encroachment upon the agency's well-settled regulatory prerogatives for this Court to disturb that decision.

B. Section 202(a) Affords EPA Discretion To Decline To Regulate Based On Policy Considerations That It Deems Relevant.

EPA's decision also finds support in the language of section 202(a). That statutory provision explicitly grants EPA broad regulatory discretion, reinforcing the soundness of EPA's determination that, even if Congress had granted it statutory authority, it would not begin to regulate greenhouse gas emissions at this time.

This Court's cases make clear that an agency authorized to make discretionary determinations may rely on *any* considerations it deems relevant if the pertinent statute does not expressly preclude reliance on such considerations or set forth an exhaustive list of relevant factors. *See, e.g., INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (there are "no limitations" on factors the Attorney General may consider in determining whether to grant a discretionary waiver of deportation); *Lopez v. Davis*, 531 U.S. 230, 244 (2001) (Bureau of Prisons may deny sentence reductions to all offenders whose crimes involved firearm possession because the statute does not prohibit the agency from relying on discretionary factors). EPA thus enjoys broad discretion when determining whether or when to make an "endangerment" determination under section 202(a), which requires the Administrator to promulgate emissions standards for any "air pollutants" that

"in *his judgment* cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1) (emphasis added).[4]

Petitioners appear to acknowledge that scientific uncertainty is an appropriate ground upon which EPA may rest its refusal to make an endangerment determination, *see* Pet. Br. 41, but they argue that EPA erred when it pointed to concerns about inefficient, piecemeal regulation; possible serious foreign policy repercussions; and the technological infeasibility of regulating greenhouse gas emissions. In particular, petitioners argue that the word "shall" in section 202(a) is an implicit limitation on the types of factors the Administrator may consider. But that word imposes no such limitations because the statute requires the Administrator to exercise "his judgment." 42 U.S.C. § 7521(a). It has long been held that such language is "an express provision for administrative discretion" precisely because the Administrator "shall" take certain action after coming to a judgment. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 20 n.37 (D.C. Cir. 1976) (en banc) (equating the discretion provided by a statute using the term "may" with that afforded by the use of the term "judgment" in section 202(a)(1)). That interpretation is entitled to conclusive

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[4] *See also Webster v. Doe*, 486 U.S. 592, 600 (1988) (holding that a statute authorizing the Director of the CIA to terminate an employee whenever he "shall *deem* such termination necessary or advisable in the interests of the United States" foreclosed judicial review of nonconstitutional issues because the statute "fairly exudes deference to the Director" and there was no practical means for a court to evaluate the soundness of the Director's discretionary determination about national interests). Like the statute in *Webster*, nothing in section 202(a) provides courts with a basis for second-guessing EPA's inherently discretionary judgment not to regulate greenhouse gas emissions at this time. In contrast with EPA regulation of stratospheric ozone levels, which must comply with a detailed statutory framework, 42 U.S.C. §§ 7671-7671q, there is no greenhouse-gas-specific statutory regime to which a court could look when trying to evaluate the propriety of EPA's decision.

weight because Congress has amended the Act—and section 202 in particular—after *Ethyl* without modifying the discretionary "in his judgment" language. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Moreover, to the extent that the clear language of section 202(a) is considered ambiguous, EPA's conclusion that section 202(a) allows it to take regulatory efficiency, foreign policy, and technological limitations into account is a reasonable interpretation of the statute entitled to substantial judicial deference. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

Neither *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), nor *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), upon which petitioners rely, is to the contrary. In *Whitman*, the Court held that EPA may not take cost considerations into account when setting NAAQS under section 109(b)(1) because the Clean Air Act expressly mandates that NAAQS be based on the "information about health effects contained in the technical 'criteria' documents compiled under § 108(a)(2)." *Whitman*, 531 U.S. at 465. Similarly, in *Union Electric*, the Court held that section 110 "provides no basis for the Administrator ever to reject a state implementation plan on the ground that it is economically or technologically infeasible" because "the States may submit implementation plans more stringent than federal law requires" and "the Administrator must approve such plans if they meet the minimum requirements of § 110(a)(2)[.]" 427 U.S. at 265. Unlike sections 109(b)(1) and 110, which significantly constrain EPA's discretion by limiting the considerations the agency may take into account when establishing NAAQS or approving state implementation plans, section 202(a) does not limit the factors EPA may consider when exercising its own judgment to decide whether an endangerment determination is appropriate.

* * *

In order for petitioners to prevail in this case, this Court must disregard well-established limits on Article III standing, overturn Congress's decades-long determination not to grant EPA regulatory authority over greenhouse gases, and displace EPA's determination that, even if Congress had granted it the requisite authority, such regulation would be inappropriate at this time. This Court should reject petitioners' invitation to disavow established standing principles and to second-guess the political branches' policies regarding the complex issue of global climate change. The politically sensitive and scientifically uncertain decision whether to mandate federal regulation of vehicular greenhouse gas emissions properly rests with Congress. This Court should not—and need not—inject itself into that ongoing debate.

CONCLUSION

The Court of Appeals' decision should be affirmed.

Respectfully submitted,

KENNETH W. STARR
STUART A.C. DRAKE
ANDREW B. CLUBOK
ASHLEY C. PARRISH
DEREK S. BENTSEN

KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W
Washington, D.C. 20005
(202) 879-5000

THEODORE B. OLSON
Counsel of Record
MIGUEL A. ESTRADA
DAVID DEBOLD
MATTHEW D. MCGILL
AMIR TAYRANI

GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, Ohio 48123

Attorneys for Respondents

October 24, 2006